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IN THE

Supreme Court of the United States

October Term, 1966.

No. 299

THOMAS DOWNIE,

Petitioner.

v.

UNITED STATES LINES CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Thomas Downie, respectfully prays that a Writ of Certiorari issue to review the determination of the United States Court of Appeals for the Third Circuit entered in the above-entitled matter on April 1, 1966.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 231 F. Supp. 192 (Appendix A). The Opinion of the Court of Appeals for the Third Circuit is reported at — F. 2d — (Appendix B).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 1, 1966 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

May the living victim of a personal injury negligently inflicted upon him recover damages for the consequent shortening of his life expectancy as a separate and distinct item of damage when his action is brought for recovery under the Jones Act?

STATEMENT OF THE CASE.

Thomas Downie, a seaman, brought an action for damages under the general maritime law as modified by the Jones Act. He claimed that the United States Lines Co., acting through its purser, was negligent.

The evidence established that on November 5, 1958, the plaintiff was employed as an electrician aboard the S. S. "American Builder". At 2 o'clock that morning, Downie awoke with a sharp pain in his arm. He went to sleep again, and sometime later, he awoke with a sharp pain in his chest which shot across his shoulder and all the way down his arm.

The plaintiff awoke in the morning and turned to. However, he felt himself getting weaker, and eventually contacted the ship's purser to ask if he had any medicine for the pain in his chest and arm. At the purser's direction, the plaintiff went to the purser's office which was one deck above and explained his experience of the previous night. The purser instructed Downie to change his clothes and come back to his office. On Downie's return, the purser directed Downie to a clinic which the purser stated wasn't very far, but was, in fact, approximately a mile from the vessel. The plaintiff walked the entire distance, stopping several times to rest.

The medical testimony on both sides sustains the conclusion that Downie suffered a myocardial infarction caused by an occlusion or stoppage in the coronary arteries.

At the trial, the plaintiff made no claim that the heart attack itself was caused by any act or omission on the

defendant's part, but his contention was that the purser was negligent in permitting the plaintiff to move about the ship and to walk to the clinic after the purser knew, or should have reasonably known of Downie's heart condition. This negligence aggravated the condition which resulted from the heart attack and resulted in plaintiff's present condition, along with a shortening of his life expectancy.

Dr. David Gelfand, an eminent and respected cardiologist, testified that, in view of plaintiff's prior excellent medical history, the reasonable period of disability and convalescence for Downie would have been from three to four months and that Downie would have been able to return to his former work within four months. However, due to the negligence of the defendant in causing Downie to walk to the clinic while under the rigors of cardiac insult, the plaintiff's heart muscle was damaged irreparably. Accordingly, the plaintiff's life expectancy which was approximately seventy per cent of his normal life, by reason of the heart attack itself, was further reduced to twenty to thirty per cent of that seventy per cent by the physical exertion attending plaintiff's walk to the hospital during a very acute phase of heart attack.[1]

The Trial Judge submitted the issue to the jury with appropriate instructions. Special interrogatories were submitted and among these was Interrogatory 4(a) which stated:

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1. At the time of trial, Thomas Downie was 57 years old. Were the plaintiff free of cardiac complication, his life expectancy would have been approximately 18 years (N. T. 128-129).

A person, such as Thomas Downie, who sustains a myocardial infarction, but who enjoys an uncomplicated recovery, has a prognosis of approximately seventy per cent of his normal life expectancy. Thus, Dr. Gelfand testified that Downie's life expectancy of 18 years at the time of trial was reduced by reason of his original heart attack to approximately 12 years (N. T. 130) and that the consequence of defendant's negligence resulted in a further reduction of this expectancy to between three to four years from the date of Dr. Gelfand's testimony (N. T. 129-131). Thus, the negligence of the defendant resulted in a shortening of Downie's life expectancy to approximately eight years (N. T. 130).

"Of the total damages stated in your answer to Interrogatory No. 4, how much, if anything, was included for a shortening of plaintiff's life expectancy?"

The jury, in answer to this interrogatory, found that the plaintiff's life expectancy was, in fact, shortened and stated that $25,000.00 of the total damages of $86,900.00 awarded plaintiff represented compensation for shortening plaintiff's life expectancy.

Defendant filed a Motion for modification of the verdict, contending that, under the law, plaintiff may not recover for shortening of life expectancy as a separate element of damage. The Trial Judge granted defendant's Motion to the extent that he modified the amount of the judgment from $86,900.00 to $61,900.00, thereby eliminating the jury award of $25,000.00 for the shortening of life expectancy. 231 F. Supp. 192. The appeal followed.

The only issue before the Court was whether or not there was a separate and distinct element of damage for the shortening of life expectancy. The court in an equivocal opinion refused to recognize that the reduction of one's life expectancy is in and of itself compensable. However, the majority continued to opine that an injured plaintiff that suffered a shortening of life expectancy as a consequence of his injury should be permitted to recover for this injury by resorting to already existent rules of damage applied in tort actions. Accordingly, the determination of the district court eliminating the jury award of $25,000.00 for the shortening of life expectancy was reversed and a new trial was granted limited to the issue of damages. Judge Kalodner and Staley dissented.

REASON RELIED ON FOR ALLOWANCE OF WRIT.

Where There Is Competent Medical Evidence That the Life Expectancy of a Plaintiff Has Been Shortened as a Result of the Negligence of the Defendant and the Jury Finds That Such Life Expectancy Has, in Fact, Been Shortened and Makes an Award to Compensate the Plaintiff for Such Shortening of Life Expectancy, Such Element of Damage Is Proper as a Separate Item of Recovery.

This action has been brought under the Jones Act which is remedial in nature and designed for the benefit and protection of seamen who are, peculiarly, the wards of the admiralty. The purpose of this Act being to enlarge that protection, rather than narrow it, its provisions, as well as the general maritime law that it modifies, must be liberally construed to attain that end. *The Arizona v. Anelich,* 298 U. S. 110; *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424. In cases arising under the Jones Act, therefore, the orbit of damage should not be curtailed as this would defeat the purpose for which the Act was promulgated.

It is well settled in our law of damages that the primary purpose to be served by an award is to put the plaintiff as nearly as possible in the same position he would have been had the defendant's conduct not resulted in injury. 2 *Harper & James, Torts,* p. 1301. Thus, an injured party's cause of action in tort is for the full injury, including both the immediate consequences of the wrongful act, as well as those which a jury determines may occur in the future. *McCall v. United States,* 206 F. Supp. 421 (E. D. Va. 1962).

There is no question that in those cases where a physical injury results in the absolute loss or impairment of a useful anatomic or physiological function, the courts will grant damages so as to compensate for such injury alone,

regardless of its impact on earning capacity, or pain and suffering. *Labeck v. Jarvis,* 145 F. Supp. 706 (E. D. Pa.) Aff'd 250 F. 2d 285; *Greyhound Corp. v. Blakely,* 262 F. 2d 401 (9 Cir. 1958); *Hercules Powder Co. v. Morris County,* 93 N. J. Law 93, 107 Atl. 433 (1919); *Burgan v. Pittsburgh,* 373 Pa. 608 (1953); *Chavez v. United States,* 192 F. Supp. 263 (D. Mont. 1961); *Cronenberg v. United States,* 123 F. Supp. 693 (N. C. 1954); *Pabon v. Cotton State Mutual Insurance Co.,* 196 F. Supp. 586 (P. R. 1961).

This willingness of courts to compensate *pro tanto* for amputation of an anatomic member which results in a narrowing, rather than a shortening, of the spectrum of life, is the most significant argument in support of affording similar protection to a wrongful shortening of life expectancy. Chopping eight years from a man's life expectancy is no less a harm than amputating his hand, as in both cases he has been deprived of a vital resource which is every man's heritage and natural wealth and in which he has a valuable property right. We are dealing here with the absolute loss of a valuable asset—life substance.

It is well established that one has a legal interest in his own life entitling him to complain if the integrity of his life is impaired by the tortious conduct of another. His normal expectancy is a thing of temporal value and its impairment is something for which damage should be awarded. Thus, as early as *Murphy v. New York & New Haven R. R. Co.,* 30 Conn. 184 (1861), it was recognized that it was a cognizable injury to a legally protected interest to hasten the death of an individual. In so ruling that Court stated:

> ". . . it is alleged in the declaration that the blow was so violent as to produce the death of the intestate. And is this no injury? If to take one's liberty or one's property without justification is an injury, how much more is the taking of human life: The elementary books, in speaking of absolute rights, classify them thus:—1st. The right of personal security; 2d.

> The right of personal liberty; and 3d. The right to acquire and enjoy property. If these rights are valued in this order of preference, then every man of common understanding would at once pronounce it absurd to hold that it is no injury to a person to take his life, while it is to strike him a light blow. Such a distinction is not worth talking about, and has no foundation or existence in the law, as it has none in common sense."

In *Littman v. Bell Telephone Company,* 315 Pa. 370, the Supreme Court, in reviewing the case of *Maher v. Philadelphia Traction Co.,* 181 Pa. 391, indicated that Pennsylvania as early as 1891 recognized this head of damage. Thus, in *Littman* the Supreme Court stated:

> "The parents sued for damages and the court held that 'in a negligence case where the plaintiff has died and the action has survived to his personal representatives, recovery may be had, not only for the mental and physical suffering up to the time of plaintiff's death and diminution of earning power during a period of life which he would have probably lived had the accident not happened, *but also for the value of the life.*" (Emphasis added.)

Of prime significance in the line of American authority is the recent case of *Sox v. United States,* 187 F. Supp. 465 (So. Car. 1960). That case arose under the Federal Tort Claims Act, 28 U. S. C. A., Sec. 1346. It was there recognized that the deprivation of normal life expectancy was a separate cognizable element of damage. The Court found, as a fact, that the life expectancy of the plaintiff has been shortened by the accident, and as a result of such finding, set forth the measure of damage as follows:

> "The measure of damages in this case seems to be embraced within three general elements: (a) compensa-

tion for the injury and resulting impairment of mind and body, (b) compensation for the cost of care necessitated by the injury and impairment including the cost of probable future care, and (c) *deprivation of normal life expectancy.*" (Emphasis added.)

Further support for this concept can be gleaned from the English authorities which have traditionally recognized the shortening of life expectancy as a valid head of damage. *Munkman, Damage For Personal Injury And Death,* 71-78 (1956); *Phillips v. London & S. W. R. Co.,* 5 Q. B. D. 78.

In *Flint v. Lovell,* (1935) 1 K. B. (Eng.) 354, the Court of Appeals there approved an award of damages to a 70-year-old man for serious injuries caused by the defendant. These resulted in continued pain and suffering and reduced the plaintiff's expectation of life from eight or nine years to less than four years' existence as a helpless invalid. The award expressly included compensation for this loss of life expectancy. In affirming this award, the Court of Appeals stated that the right of a *living* person for wrongful shortening of life expectancy was existent and was never foreclosed by the ancient ruling of Lord Ellenborough in *Baker v. Bolton,* 1 Camp. 493 (1808), where it was stated that the death of a human being could not be complained of as an injury. In affirming the award, Judge Greer stated:

"Having regard to the peculiar origin of the rule, I have come to the conclusion that it has no application to a case in which a plaintiff still living at the date of the trial is asking for damages on the ground that he has not only suffered severe pains of body and mental disquietude through the prospect of an early death, but also claims that what might have been an eight to ten years' pleasant life in which he could have carried on his normal activities has been converted into a precarious tenure not likely to exceed twelve months, during which he will continue to suffer severely as the result of the wrong of which he complains. It is my consid-

ered judgment that under the rules as to measure of damage laid down in Hadley v. Baxendale, (1854) 9 Exch. 341, 156 Eng. Reprint. 145, 5 Eng. Rul. Cas. 502, the plaintiff's claim to damages on the ground that his life would be shortened was one on which he is entitled to succeed."

The decision in *Flint v. Lovell* was approved by the House of Lords in *Rose v. Ford,* (1937) A. B. 826 (1937), 3 All. Eng. R. 359, and expanded that decision so as to allow recovery for the shortening of a life expectancy in cases where the injured person was not alive at the time of the action. In so ruling, Lord Atkin stated:

"It does not seem to me necessary to say that a man has a personal right, of the nature of property, in his life, so that, when it is diminished, he loses something in the nature of valuable property. I do not say that this is not so, but I am satisfied that the injured person is damnified by having cut short the period during which he had a normal expectation of enjoying life, and that the loss, damnum, is capable of being estimated in terms of money, and that the calculation should be made."

Again, in *Benham v. Gambling,* (1940) 57 Times LR (Eng.) 177-HL, the Court reasserted the settled English rule that the shortening of one's life expectancy was an accepted item of damage. This concept has been accepted as the law of Scotland in *Reid v. Lanarkshire,* 1 Scots L. T. 54 (1934); the law of Alberta in *McGarry v. Canada West Coal Ltd.,* 2 Alberta 299 (1909). As a portion of the Common Law of England it has been applied in the admiralty and is a portion of the maritime law of that nation. See *The Aizkarai Mendi,* (1938) 3 All. E. R. 483; *The Oropesa,* (1942) p. 140, 58 T. L. R. 328.

In this regard, our maritime law has in the past, looked to other jurisdictions and bodies of law in order

to afford full compensation. Thus, in *The Osceola*, 189 U. S. 159 (1903) this Court took cognizance of the English Merchant Shipping Act of 1976 when it extended the scope of damages for an injured seaman beyond that previously granted. In *Just v. Chambers*, 312 U. S. 383, and similar cases, the maritime law was supplemented so as to afford a remedy for death where it was alleged that there was none under the common law, and in cases under the Death on the High Seas Act, our courts have looked to state law so as to afford a remedy for pain and suffering not otherwise permitted under that statute. *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (D. C. N. Y. 1959). Certainly in a situation such as that at bar, our courts should look to the British maritime law so as to aid us in defining the rights of our seamen and afford them full protection.[2]

Though the trial judge charged the jury on the shortening of plaintiff's life expectancy, and the jury, upon the medical evidence submitted to it, found as a fact that Downie's life expectancy was shortened, the Court denied this aspect of the recovery. The trial judge reasoned that the submission of this kind of damage to the jury injected highly speculative elements for the consideration of the factfinders. The majority of the Court of Appeals agreed.

This objection of the majority of the Court of Appeals is unfounded in the light of the recent decisions of the Supreme Court which delineate the jury's functions in Jones Act-F. E. L. A. cases.

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2. The case of *Flint v. Lovell* reported the common law of England. It stated that the doctrine of *Baker v. Bolton* did not foreclose the claim for damages for a shortened life expectancy of a living litigant. As this was unquestionably the law of England as it existed at the time of the Judiciary Act of 1789 it can be contended that this measure of damage was also a portion of the general maritime law of that nation which was adopted into our body of maritime law at the time of the passage of the Judiciary Act of 1789. See *Black and Gilmore, The Law of Admiralty*, Section 1-16; *Dickinson, The Law of Nations as Part of the National Law of the United States Act*, 101 Univ. of Pa. L. Rev., pp. 25 to 56 and 792 to 833.

As was indicated, the jury in this case did, in fact, find that there was a shortening of plaintiff's life expectancy. This finding was based upon the clear testimony of Dr. Gelfand. To deprive the plaintiff of his award on the basis of the allegedly speculative aspect of this cause of action is, in effect, to have deprived him of the right to trial by jury which the Supreme Court assures in this type case.

A number of leading decisions by the United States Supreme Court have delineated the role of the jury in making their findings. In *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29 (1943) the Supreme Court, in upholding a jury verdict for the plaintiff, stated:

> "The very essence of its (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored." (321 U. S. at p. 35)

See further, *Lavender v. Kern*, 327 U. S. 645 (1945); *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957); *Gallick v. Baltimore & Ohio R. R. Co.*, 372 U. S. 108 (1963).

It is also well settled that the jury's prerogative extends to medical questions. In *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 324 (1960), the Court held that it was for the jury to determine whether the impact of a wrench upon plaintiff's foot aggravated a pre-existing Buerger's Disease, and to resolve the conflict in medical expert testimony.

In *Sentilles v. Inter-Carribean Corp.*, 361 U. S. 107 (1959), suit was brought under the Jones Act to recover damages resulting from traumatic aggravation of a latent tubercular condition. A trial, the plaintiff received a jury verdict of $20,000.00. The Fifth Circuit reversed, holding the evidence was insufficient to support the jury's finding that the accident caused the flare-up of the tubercular condition. On certiorari, this action of the Appellate Court was reversed. The Supreme Court there stated:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration."

Accordingly, this head of damage does not present so speculative a situation that a jury could not properly make its determination. The fact of the matter is that the jury did make its determination in line with the charge of the court and upon the clear and convincing testimony of Dr. Gelfand. There is nothing more speculative about this item of damage than there is in the ascertaining of life expectancy itself or in the jury's evaluation of pain and suffering.

The majority's ruling that the shortening of one's life's span is not "per se a compensable element of damages . . . because of the incalculable variables which may enter into any attempt to place a value on life" is in irreconcilable conflict with its simultaneous declaration that "damages for the curtailment of one's life expectancy" may be awarded when based on measurable components of injury, since the denial of recovery for this curtailment benefits the tortfeasor at the expense of his victim. The majority, rather than treating the shortening of one's life expectancy as a per se compensable element of damage

would prefer to award separate amounts for such provable elements such as one's ability to dance, bowl, swim, or engage in similar recreational activities. It is difficult to subscribe to a doctrine which would permit an award for inability to dance but denies compensation for the loss of life itself. As was stated by Chief Judge Kalodner, the distilled essence of the majority's doctrine is that the part is greater than the whole; that the fragments of life which it specifies have ascertainable value, but that the total fabric and structure of life itself has no separate ascertainable value.

In reviewing the doctrine that the shortening of life expectancy is a separate and distinct element of damage, the majority eliminated the one workable method by which a jury could evaluate this item which even the majority finds to be legally cognizable. In so doing, it requires the District Court to charge on the minutia of life without actually setting any realistic legal standing. The administration of justice would obviously be better served by the adoption of the dissent in this case rather than the affirmants of the majority concept of handling this item of damage.

CONCLUSION.

The head of damage for the shortening of one's life expectancy must be sustained. It would be unworthy of law and logic at this time and in an action under the Jones Act to hold that an individual may have redress in damage which obstructs the exercise of physical faculties but not for such injuries which cut these faculties short in their entirety. What is more, the item of damage must be dealt with as a separate and distinct entity and not resolved by incorporating it into already existent pigeonholes of damage. The action of the District Court in nullifying the award so as to take away the jury award of $25,000.00 for the shortening of life expectancy was erroneous. Likewise, the action of the Court of Appeals in refusing to treat the

shortening of life expectancy as a separate and distinct element of damages was erroneous. Accordingly, the judgment of the Court of Appeals reversing the District Court and granting a new trial should itself be reversed and the jury award of $25,000.00 for the shortening of plaintiff's life expectancy reinstated.

Respectfully submitted,

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FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioner.

APPENDIX A.

OPINION.

June 22nd, 1964

KRAFT, *J.*

This action for damages under the Jones Act is before us on defendant's post-trial motions following a special verdict of a jury for the plaintiff.

The evidence was sufficient to establish the following: On November 5, 1958, plaintiff was employed as an electrician aboard the S. S. American Builder, a vessel owned and operated by the defendant, and then docked in the Port of London. Plaintiff awoke about 2 o'clock that morning with a sharp pain in his arm. He went to sleep again, and some time later awoke with a sharp pain in his chest which "shot across" his shoulder and all the way down his arm. On his way to the latrine, plaintiff had to stop and rest and, with the pain, he broke out in a sweat and became very weak. After stopping several times for rest, he got back to his bunk where he remained the rest of the night. Plaintiff awoke in the morning with similar pains, but arose, washed and went to the messroom.

Plaintiff began work at 8 o'clock, but felt himself getting weaker and his arm and chest felt sore. He complained to the first engineer who said "take it easy for the day, go to bed". Plaintiff then called to Pomerleau, the ship's purser, who also served as pharmacist's mate, and asked if he had any medicine for a sore chest and pain in the arm. At Pomerleau's direction, plaintiff went to the purser's office which was one deck above. Plaintiff told Pomerleau what he had experienced during the night, that his arm and chest were still sore and that he felt "awful" weak. Pomerleau instructed plaintiff to change his clothes and come back to his office.

On plaintiff's return, Pomerleau took him on deck and gave him directions to a clinic, which Pomerleau stated wasn't "very far". Pomerleau also handed plaintiff a letter addressed to the medical officer of the Albert Dock Hospital, to which Pomerleau had previously referred as the 'clinic". The letter requested that plaintiff be examined and treated, and stated in part "He complains this morning of numbness left arm with pain in chest. During the night he stated pain quite severe with profuse sweating, etc. Possible cardiac complications?"

The hospital was approximately a mile from the vessel. Plaintiff walked the entire distance, stopping several times to rest. On his arrival, he was examined and then sent to a different hospital in London, where he remained for three weeks. He was then returned to the United States where he was an inpatient at the Staten Island Marine Hospital for nine days. Thereafter, plaintiff received medical treatment at the Baltimore Marine Hospital as an outpatient until April 28, 1959.

It is not disputed that plaintiff suffered a heart attack in the early morning of November 5, 1958. The medical testimony, on both sides, as we understand it, indicates that plaintiff sustained a myocardial infarct caused by an occlusion or stoppage in the coronary arteries.

Plaintiff makes no claim that the heart attack itself was caused by any act or omission on defendant's part. He does contend, however, that the purser was negligent in permitting plaintiff to move about the ship and to walk to the Albert Dock Hospital after the purser knew, or reasonably should have known, of plaintiff's heart condition, and that this negligence aggravated the condition which resulted from the heart attack and caused plaintiff's present condition and a shortening of his life expectancy.

Defendant's first complaint is that the trial Judge erred in submitting to the jury the issue of plaintiff's claim for damages for diminution of his life expectancy.

Dr. Gelfand, plaintiff's medical witness, testified that plaintiff "had a heart attack when he awakened"; that in view of plaintiff's prior medical history, "the reasonable period of disability and convalescence in a case like Mr. Downie would be from three to four months. In other words, we would expect Mr. Downie to make a complete recovery within three to four months and to be able to return to his former work." He stated that plaintiff's heart muscle was damaged irreparably by his walk to the clinic during a very acute phase of his heart attack. He testified that plaintiff's life expectancy, already reduced to 70 per cent of normal by the heart attack itself, was further reduced to 20 to 30 per cent of that 70 per cent by the physical exertion attending plaintiff's walk to the hospital.

Dr. Soloff, defendant's medical witness, expressed the opinion that plaintiff's walk to the hospital had no aggravating effect on his heart attack, and no bearing on plaintiff's present condition or life expectancy. He testified that "it just doesn't seem likely to me that [the walk] is of any real significance at all".

The trial Judge submitted the issue to the jury with appropriate instructions. The jury, in answer to an interrogatory, stated that $25,000 of the total damages of $86,900 awarded plaintiff represented compensation for shortening of plaintiff's life expectancy.

Defendant contends that, under the law, plaintiff may not recover for shortening of life expectancy as a separate element of damages. After extended research and very careful consideration, we think defendant's contention is sound and must be sustained.

The Jones Act provides that any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law ". . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . ." Section 1 of the Federal Employers' Liability Act, 45 U. S. C.

§ 51, states that a common carrier by railroad ". . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . ." In *Dow v. Carnegie-Illinois Steel Corporation,* 165 F. 2d 777 (3rd Cir. 1948), a Jones Act case, the Court held (p. 779):

> "In proceedings brought under the Federal Employers' Liability Act the rights and obligations of the parties depend on the Act and the applicable principles of common law. New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167. It follows, therefore, that the measure of damages is as indicated by the Act and by the federal law."

We have found no case, under either the Federal Employers' Liability Act or the Jones Act, in which the question of reduction of life expectancy as an item of damages has been raised or considered. That very circumstance would seem to militate against the recognition of such an element of damage.

The English cases, beginning at least with *Flint v. Lovell,* 1 K. B. 354 (1935), do allow recovery for shortening of life expectancy as a separate and distinct element of damages. We have read most of the cases following *Flint v. Lovell,* but can see no reason to discuss them in detail. They are collected in a note at 131 A. L. R. 1351. Our residual impression, after careful study, is that the English Courts are not wholly satisfied with the rule allowing recovery. The subject, by its very nature, easily lends itself to abstract metaphysical speculation, wholly foreign to the essentially pragmatic approach of the law. As Viscount Simon remarked in *Benham v. Gambling,* a leading case: "The question thus resolves itself into that of fixing a reasonable figure by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a court of law, but in view of the

earlier authorities we must do our best to contribute to its solution."

It seems to us that the English rule has evolved to the point where recovery is recognized more in theory than in fact. Our views accord with those expressed by Judge Wyzanski in *O'Leary v. United States Lines Co.*, 111 F. Supp. 745, 747 (D. Mass. 1953): "The English rule has not proved to be entirely satisfactory in England. It has been so modified in practice that only small flat sums are now allowed."

The American cases appear uniformly to reject the English rule. See, Annot. 97 A. L. R. 823. We have found no case in which the shortening of life expectancy was recognized, clearly and unequivocally, as a separate and distinct element of damages. The general rule is stated at 25 C. J. S., Damages, § 56, p. 546:

> "The fact that plaintiff's life has been shortened by the injuries cannot be considered in assessing damages, although there is some authority to the effect that the jury may consider the fact that plaintiff's life is shortened, not for the purpose of determining the amount of damages, but for the purpose of determining the extent of the injury."

The Court of Appeals of Maryland recently dealt with the question for the first time in *Rhone v. Fisher*, 167 A. 2d 773 (Md. 1961). After consideration of *Benham v. Gambling* and other English cases, the Court refused to adopt the rule (p. 777):

> "We recognize that there is some persuasiveness in the contention that the shortening of one's life by the negligent act of another should give the victim a right of recovery against the wrongdoer for that element of damage. The experience of the English courts with a rule permitting such recovery as a separate element of damages, as evidenced by Benham v.

Gambling, supra, shows the extreme difficulty of stating or developing any satisfactory rule for the measurement of damages for such a wrong, and appears to have resulted in the rule being relegated to a matter of form, rather than substance, with a maximum allowance therefor in practice of about $1,400.

"The experience of the English courts with the rule and the virtual emasculation thereof which has evolved from the experience, as well as the rather ephemeral considerations which must be taken into account under it, and also the possible duplication or overlapping of compensation under this and other heads of damages (a possibility which Roche, L. J. thought had become in large part an actuality in Flint v. Lovell, supra) do not commend the English rule to us as one for adoption in this State."

We find the Court's reasoning persuasive. Aside from other considerations, the adoption of the rule for which the plaintiff here contends would, in our view, inject new and highly speculative elements for the consideration of the fact-finders, often already confused by the complexities of the problems they are called upon to answer. To the prophetic task of determining life expectancy, too frequently on the basis of minimal evidence, would now be added the burden of determining the extent of any foreshortening. To the muddle of other uncertain items of damge would now be added that of attempted evaluation of years of life. True, judicial refuge might be had once more in the phrase "fair and reasonable compensation", but what is fair and reasonable for years of bliss or for years of hell on earth; and who can fairly or reasonably foretell which such years were to be. Too much is left to rosy surmise or dark conjecture—and this in a field where some reasonable evidential basis should support the fact-finding. There is no reason to believe that the English rule would prove any more satisfactory in practice here than it has in England.

Plaintiff refers to *Sox v. United States*, 187 F. Supp. 465 (E. D. So. Car. 1960), an action under the Tort Claims Act for damages for prenatal injuries. The Court listed "deprivation of normal life expectancy" among the elements of damages, and awarded plaintiff a lump sum with no allocation among the items listed. There is no discussion of the question, no citation of authority, and it is not clear whether the Court regarded the deprivation of expectancy as a separate item of recovery, or as merely bearing on the extent of the injury. We do not regard the case as trustworthy precedent. Other cases submitted by plaintiff suffer from the same infirmity.

We conclude, then, that the trial Judge erred in submitting to the jury's consideration the issue of a shortening of plaintiff's life expectancy as a separate element in the determination of damages.

Defendant's only other complaint is that the trial Judge erred in admitting into evidence, over defendant's objection, certain statements contained in a volume entitled "The Ship's Medicine Chest and First Aid at Sea".

This book was required to be aboard the United States Lines' ships, and was, in fact, aboard the vessel here involved and available to the purser. The purser admitted that he did not refer to the book when plaintiff consulted him on the morning of his heart attack. Briefly, the statements admitted described the symptoms of coronary heart disease and emphasized the importance of "strict bed rest". The statements were offered and received for the limited purpose of showing the purser's knowledge, and the trial Judge carefully instructed the jury that the statements were not admitted as evidence of the truth of the matters asserted, or for any purpose other than to prove notice to the purser.

The statements were clearly admissible as circumstantial evidence of the purser's knowledge of the facts, and of the acts or omissions on his part which might constitute negligence. See 6 Wigmore on Evidence (3rd Ed.), § 1788,

et seq. Whether in fact the statements were or were not correct was immaterial for the purpose of determining their admissibility. Their correctness was substantiated by the testimony of the medical witnesses on both sides at the trial. The trial Judge's ruling was not a violation of the hearsay rule, as defendant contends. The prohibition of the hearsay rule excludes extrajudicial utterances only when offered to evidence the truth of the matter asserted.

Smith v. Whittier, 30 P. 529 (Calif. 1892), is directly in point. It was held in that case that a witness who ran an elevator, which had caused the injury in issue, could testify that he had been told that harm would come if he did not follow certain instructions, which he detailed. The Court's reasoning is equally applicable here (30 P. 532):

> "Whenever the knowledge or information of the party charged to have been negligent is a factor in determining such question [of negligence], it is proper, for the purpose of showing such knowledge or information, to show that notice was given to him, and that he was informed of the facts which would constitute negligence. . . . Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath or that the opposite party had not the opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but upon the theory that the information was correct, the plaintiff in the present instance had the right to show that the defendant had received such information. . . . Such evidence is admitted for the purpose of establishing merely the utterance of the words and not their truth."

See, also, *Crespin v. Albuquerque Gas & Electric Co.,* 50 P. 2d 259 (N. M. 1935).

The admission of this evidence, in any event, could not have prejudiced defendant, since the purser's knowledge was established by his own testimony at the trial. His letter to the clinic indicated at least a definite suspicion on his part that plaintiff's complaints might be the result of a heart condition. On cross-examination, he testified:

"Q. From your own personal knowledge, do you know what the proper course of treatment is for a heart attack?

A. Yes.

Q. What is it?

A. Put the patient in bed and call a doctor.

Q. Do you know what this book says?

A. I have a general idea as to what that book says.

Q. And this book says 'Put the patient in bed and call the doctor,' too, doesn't it?

A. Yes, sir."

We conclude that there was no error in the admission of the evidence complained of, and that defendant's complaint is without merit.

Accordingly, we make the following

ORDER.

Now, June 22nd, 1964, it is ordered that:

1. Defendant's motion to vacate and set aside the judgment be, and it is, denied.

2. Defendant's motion for judgment n.o.v. be, and it is, denied.

3. Defendant's motion for a full or partial new trial or modification of the amount of the judgment be, and it is, granted to the extent that the judgment is reduced from $86,900 to $61,900.

C. WILLIAM KRAFT, JR.,
Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15026

THOMAS DOWNIE,
Appellant,

v.

UNITED STATES LINES CO.,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 18, 1965
Reargued December 9, 1965

Before KALODNER, *Chief Judge,* MCLAUGHLIN, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed April 1, 1966)

By SMITH, *Circuit Judge.*

This is an action for personal injuries under section 33 of the Merchant Marine Act of 1920, 46 U.S.C.A. § 688, which incorporates by reference and makes applicable the provisions of the Federal Employer's Liability Act, 45 U.S.C.A. §§ 51-59. The present appeal by the plaintiff is

from a judgment entered on a jury verdict in his favor. The only issue raised is one of damages which must be decided under the cited statutes and the common law principles as interpreted and applied by the federal courts. *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359, 361 (1952); *Pittsburgh National Bank v. Pennsylvania Railroad Co.*, 315 F. 2d 606, 608 (3rd Cir. 1963) and the cases therein cited. The question is whether the prospective curtailment of one's life expectancy by injury, independent of the economic loss sustained as a result of such curtailment, is a separate and distinct item of the damages recoverable in such an action.

At the time of his injury the plaintiff, an employee of the defendant, was 52 years of age and had a normal life expectancy of approximately 18 years. Early in the morning of November 5, 1958, while aboard ship, he suffered a myocardial infarction, an irreversible heart injury, which shortened his normal life expectancy. Admittedly this injury was not caused by any act or omission of the defendant. The claim for damages was based solely on the ground that subsequent to the heart attack the defendant's servants and agents were guilty of negligent conduct which aggravated the myocardial infarction. There is evidence in the record from which the jury could have found, as it apparently did, that the heart injury was aggravated, as alleged, and that this aggravation was the proximate cause of a further curtailment of the plaintiff's life expectancy.

The plaintiff contended in the court below that the diminution of his life expectancy was a compensable injury in and of itself and therefore includable as a separate element of the recoverable damages. Over the objection of the defendant, and pursuant to the written request of the plaintiff, the issue of damages was submitted to the jury on this theory.

The trial judge instructed the jury in pertinent part as follows:

"Then the plaintiff contends that though the heart attack would have foreshortened his life expectancy, that the aggravation that he contends he suffered has further shortened it, and that for the period for which it was further shortened he claims damages.

"If you so find that it was aggravated, that is the preexisting damage to his heart, and that that foreshortened his life expectancy beyond that period of foreshortening which resulted from the heart attack unaggravated, then you will include in the total of your answer to Question 4 fair and reasonable compensation for such further foreshortening of life expectancy.

"In that respect I will read and affirm plaintiff's point 12.

> 'If you find that the plaintiff is entitled to damages and that as a result of the defendant's negligence plaintiff has suffered a shortening of his life expectancy then you may award the plaintiff a fair and reasonable sum as in your best judgment will compensate him for the shortening of his life expectancy.'

That I affirm in the context of what I have just said to you a moment ago."

The issue of damages was submitted to the jury on carefully framed interrogatories as authorized under rule 49, Fed. Rules Civ. Proc., 28 U. S. C. A.[1] The jury made a general award of $86,900, which included a special award in the amount of $25,000[2] for the prospective diminution of the plaintiff's life expectancy. On motion of the defendant the trial judge modified the verdict by eliminating therefrom the special award and entered judgment on the verdict as modified. *Downie v. United States Lines Com-*

1. The trial judge made an effective use of the procedure in this case. A similar use could be made of it in all cases but particularly in those involving complicated or doubtful issues. See our opinion in *Eichmann v. Dennis*, filed July — 1965, — F. 2d —.

2. The amount of the special award was stated in answer to a specific interrogatory.

pany, 231 F. Supp. 192. The plaintiff argues that this modification of the jury verdict was error.

The plaintiff here contends, as he did in the court below, that the reduction of one's life expectancy is in and of itself compensable and therefore a proper element of the recoverable damages. He cites no cases, either federal or state, to support this view and we have found none. The plaintiff relies primarily on a line of English and Canadian cases, the first of which was decided in 1935. *Flint v. Lovell*, 1 K. B. 354, 97 A. L. R. 815. Therein it was held that the shortening of one's life expectancy by reason of injury constitutes an element for which damages may be recovered. Apparently the rule has not proved satisfactory and the English courts have experienced considerable difficulty in its application. See ANNOTATION, 131 A. L. R. 1351-1356; COMMENTS, THE MEASURE OF DAMAGES FOR A SHORTENED LIFE, 22 U. CHI. L. REV. 505, 513 (1954). The rule was modified in later cases and as modified limits the amount of recovery. *Ibid.*

The novel doctrine of the English cases has failed to gain acceptance in the courts of this country. Thus far the state courts which have considered the doctrine have rejected it for various reasons which are not relevant here. *Rhone v. Fisher*; 167 A. 2d 773 (Ct. App. Md.—1961); *Ham v. Maine-New Hampshire Inter. Bridge Authority*, 30 A. 2d 1 (Sup. Ct. N. H.—1943); *Lake Erie & W. R. Co. v. Johnson*, 133 N. E. 732 (Sup. Ct. Ind.—1922); *Ramsdell v. Grady*, 54 Atl. 763 (Sup. Jud. Ct. Maine—1903); *Richmond Gas Co. v. Baker*, 45 N. E. 1049 (Sup. Ct. Ind.—1897). The federal courts have similarly rejected it in two cases which involved the application of state law. *Farrington v. Stoddard*, 115 F. 2d 96 (1st Cir. 1940); *O'Leary v. United States Lines Co.*, 111 F. Supp. 745 (D. Mass. 1953).

A comprehensive analysis of the English cases may be found in ANNOTATIONS, 97 A. L. R. 823-826 and 131 A. L. R. 1351-1356. See also *Rhone v. Fisher, supra.* The rule of these cases appears to be predicated on the theory that the

shortening of one's life expectancy is *per se* a compensable element of damages in an action for personal injury. We believe that the rule is not feasible because of the incalculable variables which may enter into any attempt to place a value on life; absent some workable criteria, a damage award would be base speculation. Although we are unwilling to adopt the *per se* theory it does not follow that damages for the curtailment of one's life expectancy, based on measurable components of injury, are not recoverable. We believe that a fair and just result can be achieved by resort to the rules of damages usually applied in tort actions.

It is the general rule that a seaman who has been injured by the tortious conduct of his employer, or his employer's servants, is entitled to an award in damages commensurate with the nature and extent of his injuries. He is entitled to reimbursement for his loss of earnings, past and prospective, any impairment of his earning capacity, medical expenses incurred and to be incurred, and any other economic loss he may have sustained or is likely to sustain. *Bartholomew v. Universe Tankships, Inc.*, 279 F. 2d 911, 916 (2nd Cir. 1960), cert. den. 359 U. S. 1000. In addition, he is entitled to redress for his physical injury, including the effects thereof, such as pain, suffering, mental anguish, discomfort and inconvenience. These are the items customarily taken into consideration in an award of damages.

If the injuries are permanent in nature and result in an impairment of earning capacity, a seaman is entitled to reimbursement for such impairment including, but not limited to, his probable loss of future earnings. *Wiles v. New York, Chicago and St. Louis Railroad Co.*, 283 F. 2d 328, 332 (3rd Cir. 1960), cert. den. 364 U. S. 900; *Vickers v. Tumey*, 290 F. 2d 426, 434, 435 (5th Cir. 1961); See *Tullos v. Corley*, 337 F. 2d 884, 887 (6th Cir. 1964). Damages resulting from the impairment of earning capacity and the probable loss of earnings must be measured on the basis of life expectancy at the time of injury. *Ibid.* The award

must be based upon the probable pecuniary loss reduced to its present net worth. *Conte v. Flota Mercante Del Estado,* 277 F. 2d 664, 669 (2nd Cir. 1960). The same rules should be applied where, as here, an element of the permanent injury is the consequent curtailment of the seaman's life expectancy. See McCormick on Damages, § 86, p. 303.

The injured seaman is also entitled to compensation, again based on life expectancy at the time of injury, for the physical and mental effects of the injury on his ability to engage in those activities which normally contribute to the enjoyment of life, including, for example, his avocations. *Dagnello v. Long Island Railroad Company,* 289 F. 2d 797 (2nd Cir. 1961). See *Bassett v. Milwaukee, Northern Ry. Co.,* 170 N. W. 944, 945 (Sup. Ct. Wis. 1919); *Kasiski v. Central Power and Light Co.,* 132 Atl. 201 (Sup. Ct. N. J. 1926); Annotations, 120 A. L. R. 535-543. The specific elements which may enter into an award of damages under this rule must necessarily depend upon the proofs.[3] There are no precise criteria by which these elements may be evaluated but they are measurable to the same extent as pain, suffering and mental anguish.

The rule discussed in the foregoing paragraph has been applied in those cases in which the victim of the tortious conduct sustains a disabling injury, such as amputation of a limb, disfigurement, or a brain disorder. We are of the opinion that justice demands the application of a similar rule where, as in the instant case, an element of the permanent disability is the consequent curtailment of life expectancy. The denial of recovery for this curtailment benefits the tort feasor at the expense of his victim.

The trial judge adequately and correctly instructed the jury as to the right of the plaintiff to recover his economic losses, determined on the basis of his life expectancy

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3. Examples of provable elements are: inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and, inability to engage in the usual family activities.

immediately before the "aggravation of his heart damage." The issue raised by the plaintiff's claim for damages, based on the diminution of his life expectancy, was submitted to the jury on the *per se* theory. The instructions were inadequate in that they failed to delineate the various factors that the jurors might have considered in arriving at a fair and just award. Under these circumstances it must be assumed that the answer to the interrogatory relating to this issue was predicated on speculation.

The judgment of the court below will be reversed and the action will be remanded for a new trial solely on the issue of damages.

KALODNER, *Chief Judge*, dissenting

I disagree with the majority's view that the wrongful shortening of one's life expectancy is not a separate element of damages in a Jones Act [1] case.

I am of the opinion that the law accords a right to life and its enjoyment, and that the invasion of this right is properly compensable as a separate element of damages.

As one text writer has graphically epitomized it, "the shortening of life through injury involves an amputation of life substance and so an absolute and irremediable loss." [2]

The English courts have long allowed recovery for shortening of life expectancy as a separate and distinct element of damages. Benham v. Gambling, A. C. 157, 166, 1 All. E. R. 7, 12 (1941); Rose v. Ford, A. C. 826, 3 All. E. R. 359 (1937); Flint v. Lovell, 1 K. B. 354, 97 A. L. R. 814 (1934); Phillips v. The London and South Western Railway Company, 5 Q. B. 78 (1879).

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1. 46 U.S.C.A. § 688.

2. Hubert Winston Smith, Director of the Law-Science Institute, Tulane University; "Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection", University of Pennsylvania Law Review. Vol. 98, page 781, note 1 (1950).

The English rule was succinctly stated by Lord Atkin, in Rose v. Ford, *supra,* as follows (p. 834):

> "It does not seem to me necessary to say that a man has a *personal* right of the nature of property in his life, so that when it is diminshed he loses something in the nature of valuable property. . . . I am satisfied that the injured person is damnified by having cut short the period during which he had a normal expectation of enjoying life: and that the loss, damnum, is capable of being estimated in terms of money: and that the calculation should be made. . . .
>
> "I am of opinion therefore that a living person can claim damages for loss of expectation of life. . . ." (emphasis supplied)

Lord Wright, in concurring, said (p. 848):

> "A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given. . . .
>
> "In one sense it is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate."

In refusing to subscribe to the English doctrine the majority has cited two federal and several state court cases in support.

With respect to the state cases it must immediately be said that they are without precedential value since this is a Jones Act case and federal law applies. The Jones Act is "remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to en-

large that protection, not to narrow it. . . . Its provisions, . . . are to be liberally construed to attain that end." The Arizona v. Anelich, 298 U.S. 110, 123 (1936).

The federal cases, Farrington v. Stoddard, 115 F. 2d 96 (1 Cir. 1949) and O'Leary v. United States Lines Co., 111 F. Supp. 745 (D. Mass. 1953) are inapposite here for these reasons: (1) in neither case was the action instituted by the person whose life had been wrongfully shortened; (2) neither case was one under the Jones Act; (3) in both cases it was held that the local state survival and death statutes did not permit the estates to recover damages, per se, for a shortened life.

To what has been said earlier with respect to the inapplicability of the state court decisions cited by the majority this may be added:

In Ham v. Maine-New Hampshire Interstate Bridge Authority, 92 N.H. 268, 30 A.2d 1 (1943), and Ramsdell v. Grady, 97 Me. 319, 54 Atl. 763 (1903), the actions were not by one whose life had been shortened, but by his estate, and further, in neither was recovery sought for a shortened life as an independent element of damages.

In Richmond Gas Co. v. Baker, 146 Ind. 600, 45 N.E. 1049 (1897), the court's holding that the plaintiff could not recover for the shortening of her life was premised on the specious assumption that since the death of a person could not be complained of as a legal wrong in a civil action at common law, curtailment of life is not an actionable injury. It is apparent that the court was persuaded to its view by precedents resting upon the authority of Baker v. Bolton, 1 Camp. 493 (1808) where it was said:

> "In a civil court the death of a human being could not be complained of as an injury."

It is equally apparent that the court (1) did not consider the fact that Lord Campbell's Act of 1846, which permitted so-called survival actions, had made obsolete Baker v. Bolton's holding, and (2) that it did not seem aware of the fact

that an English court in 1879, in Phillips v. London and South Western Railway Company, *supra,* had allowed damages to a plaintiff for his shortened life.

In Lake Erie & W.R. Co. v. Johnson, 191 Ind. 479, 133 N.E. 732 (1922), where it was also held that damages are not recoverable for a shortened life, the court, without discussion, premised its holding on its earlier decision in *Richmond Gas.*

Rhone v. Fisher, 224 Md. 223, 167 A. 2d 773 (1961), affords some measure of nourishment to the majority's position. There, the court refused to subscribe to the English doctrine, and ruled that a living plaintiff cannot recover, as a separate item, damages for a shortened life. The ruling of the court, is, however, "watered down", so to say, by its statement that the trial judge had properly charged the jury "that they might consider the evidence relating to the shortening of life 'in considering the seriousness of the injury and the consequent pain and suffering and the mental anguish, if any, to which the plaintiff has been and will be subjected in the future' ".

In the instant case the trial judge properly charged the jury that it could compensate the plaintiff for the wrongful shortening of his life expectancy as a separate element of damages. He erred when he later struck from the jury's verdict its allowance of $25,000 for the curtailment of the plaintiff's life span. I would reverse with directions to reinstate the jury's verdict as rendered by it.[3]

The majority's ruling that the shortening of one's life span is not "*per se* a compensable element of damages . . . because of the incalculable variables which may enter into any attempt to place a value on life" is in irreconcilable conflict with its simultaneous declaration that "damages for the curtailment of one's life expectancy" may be awarded when "based on measurable components of injury", since such curtailment is a "permanent injury", and

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3. The opinion of the District Court is reported at 231 F. Supp. 192 (E.D. Pa. 1964).

"the denial of recovery for this curtailment benefits the tort feasor at the expense of his victim".

The "measurable components of injury" which the majority lists as "provable elements", in footnote 3 of its opinion, are "inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and, inability to engage in the usual family activities."

I cannot subscribe to a doctrine which sanctions compensation for "inability to dance, bowl, swim or engage in similar recreational activities" but denies compensation for the loss of the right to life itself; the right to enjoy the companionship of loved ones; the right to see the glorious dawn and sunset, to feel the caress of gentle breezes or the invigorating sting of winter winds, to hear the murmur of the idling brook and the music of warbling birds, to smell the sweet fragrance of nature's flowers, and to taste the diet of life itself.

The distilled essence of the majority's doctrine is that the part is greater than the whole; that the fragments of life which it specifies have ascertainable value, but that the total fabric and structure of life itself has no separate ascertainable value.

The courts of this land have time and again ruled that damages are recoverable for loss of enjoyment of life.

In Haynes v. Waterville & O. St. Ry., 100 Me. 335, 64 A. 614 (1906), where a young boy had his hand amputed, the court stated the loss took a great deal of enjoyment out of the boy's prospective life and that loss of earning power was by no means the extent of the injury.

In King's Indiana Billard Co. v. Winters, 123 Ind. App. 110, 106 N. E. 2d 713 (1952), the jury in fixing damages for personal injuries was required to consider that the plaintiff was deprived of loss of privileges and enjoyment common to men of his class.

In Sox v. United States, 186 F. Supp. 465 (D. Del. 1960), the court allowed recovery for "deprivation of normal life expectancy" (p. 469) to an infant plaintiff who

was grievously maimed for life in the sixth month of her mother's pregnancy.

As the Michigan Supreme Court has said:

> "We are aware, of course, that there are those who say that the life of a human being is impossible to value, that although we will grapple mightily with the value of the life of a horse, of a team of mules, we will stand aloof where a human is concerned and assign it no value whatever. This kind of delicacy would prevent the distribution of food to the starving because the sight of hunger is so sickening. But we cannot shirk this difficult problem of valuation. In the cases coming to us a life has been taken and it is our duty, as best we can, to put a fair valuation on it." Wycko v. Gnodtke, 361 Mich. 331, 105 N. W. 2d 118, 122 (1960).

In rejecting the English doctrine that the shortening of life expectancy is a separate and distinct element of damages, the majority in its stead enunciates guidelines for instructions to a jury which will open a Pandora's Box. One can readily envision resort to appellate review, when a trial judge in strict adherence to the majority's guidelines, fails to include in his charge of "measurable components of injury", a component such as, for example, the loss of the right of a parent whose life has been shortened to share in the upbringing of his child or children.

The only workable basis of consideration of the issue of value of a shortened life span is its submission to a jury of one's peers as a separate element of damages. The jury can be counted on to bring to bear in its consideration of such an element the consensus of the common sense of its members, their collective experience and judgment, and their panoramic sweep of all aspects of the issue.

One need only point to the fact that in the instant case the jury's award for the 8-year shortened span of the plaintiff's life was in the amount of $25,000—approximately $3,000 a year—a sum moderate in its proportions.

Judge Staley joins in this dissent.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15026

THOMAS DOWNIE,
Appellant,

v.

UNITED STATES LINES CO.

(D. C. Civil No. 27626)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STALEY, *Chief Judge,* and McLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 9, 1963, as amended by order filed June 23, 1964, be, and the same is hereby reversed, with costs, and the action remanded for a new trial solely on the issue of damages.

ATTEST:
IDA O. CRESKOFF,
Clerk.

April 1, 1966

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 299.

THOMAS DOWNIE,

Petitioner,

v.

UNITED STATES LINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OCTOBER TERM, 1966.

No. 299.

THOMAS DOWNIE,

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v.

UNITED STATES LINES CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

In an action under the Jones Act, 46 U.S.C.A., § 688, for damages for negligence of the defendant the question is whether the prospective curtailment of the living plaintiff's life expectancy by injury, independent of the economic loss sustained as a result of such curtailment, is a separate and distinct item of the recoverable damages.

COUNTER-STATEMENT OF THE CASE.

The Petitioner's statement of the case, in material part, essentially is correct except for the reference to the testimony of plaintiff's doctor. The substance of the plaintiff's doctor's testimony is given by the trial judge and the Court of Appeals (3a, Pet. App. A and 11a, App. B, Pet.).

This testimony is to the effect that at the time of the occurrence, November 5, 1958, the plaintiff, 52 years of age, had a normal life expectancy of approximately 18 years, and that the myocardial infarction, totally unrelated to any negligence of the defendant, reduced the plaintiff's normal expectancy to 70% thereof, or 12.6 years. The testimony of the doctor was that this reduced expectancy of 12.6 years was further reduced by the negligence of the plaintiff, which occurred on November 5, 1958, *to* between 2.5 years to 3.8 years. In other words, the plaintiff would not live longer than the year 1962. The trial of the case concluded on November 14, 1963, and the plaintiff is still living, which shows that his life expectancy has not been shortened by approximately 8 years as estimated by his doctor.

The interpretation of the testimony concerning the plaintiff's shortened life expectancy was made by the Petitioner in Footnote 1 (page 3 of the Petition) is not supported by the evidence which has not been included in the certified record.

REASONS FOR DENYING THE WRIT.

I. Certiorari Should Not Be Granted to Review the Decision of the Court of Appeals Which Ordered a New Trial on Damages.

The Court of Appeals reversed the judgment of the District Court for the reason that the trial judge did not adequately or correctly instruct the jury as to what consideration should be given to the claim of diminution of life expectancy and its relation to other factors which the jury might consider in arriving at a fair and just award. (15a App. B, Pet.)

The Court of Appeals has found that the curtailment of life expectancy, standing alone, should not be the subject of a separate award of damages, but may be considered by the jury, under proper instructions, in making a fair and just award for the total damages sustained.

Until a new trial is had and final judgment is entered, we respectfully submit that the case is not an appropriate one for consideration by this Court at this time on a Petition for Certiorari.

II. The Court of Appeals Was Correct in Its Decision That a Prospective Diminution of Life Expectancy Is Not, per se, a Compensable Element of Damages.

1. *In An Action Under The Jones Act The Plaintiff's Right Of Recovery And The Amount Thereof Are To Be Determined Solely By Federal Law.*

The right of action was created by Federal Employers' Liability Act, (hereinafter referred to as FELA), 45 U. S. C. A. 51, which was incorporated into the Jones Act, 46 U. S. C. A. 688.

The latter named statute, in material part, provides:

> Any seaman who shall suffer injury . . . may maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

The right of action thus created was a federal right and is administered and protected by federal decisions.

In *Chesapeake & Ohio Rwy. Co. v. Kelly,* 241 U. S. 485, 491, the Court said:

> But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts.

In *Bailey v. Central Vermont Ry.,* 319 U. S. 350, 353, this Court again reiterated that the federal rules only are to be applied. Thus:

> The rights which the Act creates are federal rights protected by federal rather than local rules of law. *Second Employers' Liability Cases,* 223 U. S. 1; *Seaboard Air Line Ry. v. Horton,* 233 U. S. 492; *Chesapeake & Ohio Ry. Co. v. Kuhn,* 484 U. S. 44. And those federal rules have been largely fashioned from the common law (*Seaboard Air Line Ry. v. Horton, supra*) except as Congress has written into the Act different standards. *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S. 54.

See also *Ellis v. Union Pacific R. Co.,* 329 U. S. 649, 653.

In Louisiana & Arkansas Ry. Co. v. Pratt, 142 F. 2d 847, the Court considered whether interest should be allowed from the date of demand or from the date of the judgment.

The Court rejected the state statute and applied the common law. The Court said (p. 848):

> "In all actions for personal injury brought under the Federal Employers' Liability Act, the remedy given by that statute is exclusive, and all state laws are superseded in so far as they attempt to cover the same field.[3] At the time the Act was enacted, interest was not allowable on claims for personal injuries until the amount of damages had been judicially ascertained. This was upon the theory that no debt was due prior thereto or that interest was a part of the damages and was merged therewith in the amount awarded.[4]
>
> "The Act itself contains no provision with respect to interest, and the measure of damages in actions under it, being inseparably connected with the right of action created, must be settled according to general principles of law as administered in the federal courts at the time of enactment,[5] except as modified by Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.
>
> "The item of accrued interest presents a question of substantive law."[6] [Footnotes omitted.]

Aside from strictly procedural matters, state laws and decisions are not to be considered in determining the extent of the plaintiff's right under the Jones Act.

In *Dice v. Akron C. & Y. R. Co.*, 342 U. S. 359, 361, the Court said:

> "*First.* We agree with the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. *State laws are not controlling in*

> *determining what the incidents of this federal right shall be. Chesapeake & Ohio R. Co. v. Kuhn,* 284 U. S. 44; *Ricketts v. Pennsylvania R. Co.,* 153 F. 2d 757, 759. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. *Moreover,* only if federal law controls can the federal *Act be given that uniform application throughout the country essential to effectuate its purposes.* See *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 244, and cases there cited." [Emphasis supplied.]

This Court has been consistent in holding that neither lower federal courts nor state courts shall construe the Act so as to deprive claimants the rights which it conferred. See *Ferguson v. Moore-McCormack Lines,* 352 U. S. 521; *Rogers v. Missouri Pacific R. R. Co.,* 352 U. S. 500.

In *Dow v. Carnegie-Illinois Steel Corp.,* 165 F. 2d 777 (3 C. A.), a Jones Act case, it was held that in proceedings under FELA, rights and obligations of the parties depend on the Act and applicable principles of common law. "It follows, therefore, that the measure of damages is as indicated by the Act and by the federal law" (p. 779).

From the foregoing authorities, it is clear that not only the right of action but the damages in a Jones Act case are to be measured by "federal law," which brings us to a consideration of what the federal rule is with regard to compensation for shortening of life expectancy as a separate and distinct element of damages.

2. *It Has Not Been Established as a Rule of Federal Law That Shortening of Life Expectancy Alone Is a Recoverable Element of Damages.*

We have found no FELA case or Jones Act case where any federal court has held that shortening of life expectancy is a separate and distinct item of damage.

This question was considered in *Farrington v. Stoddard,* 115 F. 2d (1 C. A. 1940). That was a personal injury case occurring on land, *and jurisdiction was founded on diversity of citizenship.* The federal court was therefore applying Maine law in a death action. It held that the plaintiff could not recover for the shortening of the decedent's life expectancy under a survival statute. This case has been the subject of annotation in 131 A. L. R. 1344.

Under FELA, the estate of a decedent cannot recover the economic value of his life. *Hickman v. Taylor,* 170 F. 2d 327, 329 (C. A. 3 1948).

The other federal case in which this question was raised is that of *O'Leary v. United States Lines Company,* 111 F. Supp. 745 (D. C. Mass. 1953). This was an action for damages for personal injuries sustained by a stevedore, and again jurisdiction was based on *diversity of citizenship,* and the Court applied Massachusetts law.

The Court denied an application to amend the Complaint to claim general damages, including "a material diminution of his normal life expectancy." The Court denied the amendment, holding that no Massachusetts case had allowed such a claim "*except in so far as the decedent feared such loss and that anxiety aggravated (and thus could be embraced within) conscious pain and suffering.* Choicener v. Walters Amusement Agency, Inc., 269 Mass. 341, 343, 168 N. E. 918." (Italics supplied.)

In that case the Court also held that there was no indication that the Massachusetts Court would adopt the English rule which would allow a decedent's representative to recover damages for loss of "a predominantly happy life," as set forth in *Benham v. Gambling,* (1941) A. C. 157, 166, 1 All. E. R. 7, 12.

We have been unable to find any other federal cases where this question has been fully considered.

The plaintiff refers to *Sox v. United States,* 187 F. Supp. 465 (So. Car. 1960). While the court in that case mentions "deprivation of normal life expectancy" as one

of three elements of damages, careful reading of the opinion does not disclose that any amount for it was included in the award of general damages which followed a discussion of the scope of the first two items of (a) impairment of body and mind and (b) cost of care made necessary by total disability.

This case arose in South Carolina and was prosecuted under the Tort Claims Act, 28 U. S. C. A. 1346, which provides for liability "in accordance with the law of the place where the act or omission occurred." It would therefore appear that the court was concerned with state rather than federal law.

There have been a number of decisions in various state courts where it has been held that the shortening of life expectancy is not a compensable separate item of damages.

In view of the policy of the Supreme Court to see that federal law is uniformly applied to FELA cases, state court decisions are not controlling, but we shall nevertheless refer to them.

3. *State Court Decisions Do Not Allow Damages for Shortening of Life Expectancy.*

One of the earliest American decisions dealing with this question is that of *Richmond Gas Co. v. Baker,* 146 Ind. 600; 45 N. E. 1049 (1897). In that case, the Court said (p. 609):

> "None of the cases cited by appellee, as we believe, sustain the contention of counsel. In general, these cases reach to this, that in an action for injury by the wrong of another the actual condition of the injured person as caused by the accident may be considered for the purpose of determining the amount of damages, present and prospective, which should be awarded. *And if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent disability to make a living and the bodily and mental suffering which will result.* This, however, falls

short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life." (Italics supplied.)

The Indiana courts have consistently followed this decision. See *Cleveland, C. C. & St. L. R. Co. v. Miller,* (1905) 165 Ind. 381, 74 N. E. 509; *Muncie Pulp Co. v. Hacker,* (1906) 37 Ind. App. 194, 76 N. E. 770; *Lake Erie & W. R. Co. v. Johnson,* (1922) 191 Ind. 479, 133 N. E. 732.

Other American cases to the same effect are: *Krakowski v. Aurora, E. & C. R. Co.,* (1912) 167 Ill. App. 469; *Ham v. Maine-New Hampshire Interstate Bridge Authority,* 92 N. H. 268, 30 A. 2d 1 (1943); *Rohlfing v. Moses Akiona Ltd.,* 369 P. 2d 96 (Sup. Ct. Hawaii 1961); *Rhone v. Fisher,* 224 Md. 223; 167 A. 2d 773 (Md. Ct. App. 1961). See also 97 A. L. R., p. 823.

A rather exhaustive article on this subject "Psychic Interest in One's Own Life," by Hubert Winston Smith, appears in U. of Pa. Law Review, Vol. 98, No. 6, May 1950.

It is clear from these American decisions—and we have found none to the contrary—that loss of life expectancy is not regarded as a separate and distinct item of damage.

4. *The Recent English Decisions Are Not Part of Federal Law, and the Very Unsatisfactory Rule of Flint v. Lovell Should Not Be Adopted.*

Apparently the leading case on this subject is *Flint v. Lovell,* 1 K. B. 354 (1935). As we read that decision, it, in effect, overrules their early British case of *Baker v. Bolton,* 1 Camp. 493 (1808), in which it was said that the death of a human being could not be complained of as an injury. It appears that the judges in that case reviewed the historical origin of this decision and what they considered to be modifications thereof. However, it does appear that as late as

1917 in the *SS Amerika*, 1917 A. C. 38, some British Courts considered it to be in effect. In that case it was said, "It is far too late for this House to disturb the rule expressed by Lord Ellenborough in Baker v. Bolton," 97 A. L. R. 819.

Nevertheless, *Flint v. Lovell*, in 1935 held that this item of damage could be compensated for.

It is therefore by no means clear that when the FELA was enacted in 1908, the common law of England clearly established the rule that diminution of life expectancy was a separate item of damage.

The case of *Flint v. Lovell* was followed by *Rose v. Ford*, A. C. 826 (1937), and by the case of *Benham v. Gambling*, (1941). A. C. 157, 166, 1 All. E. R. 7, 12. These cases are rather fully discussed in A. L. R. 1351 *et seq.* The reading of those decisions will show that there were some misgivings, particularly by Roche, L. J., in *Flint v. Lovell*, A. L. R. 821, concerning the measure of damages for this item, and the danger of giving "plaintiff compensation for the same thing more than once under the various heads of damage".

It is interesting to note that in the *Gambling* case, four years later, on appeal, the House of Lords reduced a finding from £1200 to £200, showing that the British courts are concerned with the adequacy of proof of this item of damage.

In *Rhone v. Fisher*, 224 Md. 223; 167 A 2d 773, Chief Judge Brune of Maryland reviewed the English cases above referred to and refused to accept the British rule. He refers at length to the opinion of Viscount Simon, in *Benham v. Gambling*, which points out the difficulties which have been experienced in the British courts. He concluded:

> "We recognize that there is some persuasiveness in the contention that the shortening of one's life by the negligent act of another should give the victim a right of recovery against the wrongdoer for that element of damage. The experience of the English courts with a rule permitting such recovery as a separate element of damages, as evidenced by Benham v. Gambling, supra,

shows the extreme difficulty of stating or developing any satisfactory rule for the measurement of damages for such a wrong, and appears to have resulted in the rule being relegated to a matter of form, rather than substance, with a maximum allowance therefor in practice of about $1,400.

"The experience of the English courts with the rule and the virtual emasculation thereof which has evolved from that experience, as well as the rather ephemeral considerations which must be taken into account under it, and also the possible duplication or overlapping of compensation under this and other heads of damages (a possibility which Roche, L. J. thought had become in large part an actuality in Flint v. Lovell, supra) do not commend the English rule to us as one for adoption in this State." [Footnotes omitted.] (p. 777, 167 A. 2d.)

It is apparent that since the decision of *Flint v. Lovell,* the British appellate courts have sought to overcome the dangers in accepting this rule by policing and reducing awards for this particular item of damage with the practical result that a nominal sum is now looked upon as being appropriate.

Since *Benham v. Gambling, supra,* we have not found any English cases where more than £500 has been awarded for this item of damage. In the *Aizkir Mendi,* 3 All Eng. L. R. A. 483, cited by the petitioner, the Court made awards in three different age groups, awarding respectively £300, £350 and £400, the higher awards being in favor of the younger age groups. In that case the Court considered the fact that seamen, because of the hazardous nature of their calling, would likely have shorter life expectancies. This decision seems not to follow the language of Viscount Simon in the *Gambling* case, who said: "In any case the thing to be valued is not the prospect of length of days, but the prospect of a predominately happy life."

It, therefore, appears that there is lack of uniformity or understanding in England of the decision of the *Gambling* case and its application.

In "The Quantum of Damages," Kemp and Kemp, Vol. I, 2 Ed., 1961, pp. 58-67, there is a discussion of the English decisions and a table of awards in a number of cases, which vary in amount from £150 to £500.

It seems clear that the established English rule now is that a lower measurement of damages for this cause of action has been set by reason of these damages being "in fact incapable of being measured in coin of the realm with any approach to real accuracy" (per Viscount Simon, in *Gambling*).

The petitioner on page 8 of his brief refers to Munkman, "Damage for Personal Injury and Death," 71-78 (1956). In his second edition (1960), after discussing the leading cases, he says (p. 90-91):

> "More commonly, a living plaintiff has sustained severe injuries which in themselves entail a shortening of life. Thus, shortening of life is only one element in the damages, and probably the best method in these cases is not to assess it as a separate item at all."

From the foregoing it is clear that the English courts regard this very speculative item of damages as being one which has now been controlled as to amount by the courts. In view of the doubt as to the extent of the power of a federal court in a FELA or Jones Act case to reduce a jury's verdict, the English rule as to the amount of damages cannot be effectively followed in our courts and should not be adopted.

5. *The Court of Appeals Was Correct in Holding That the Shortening of Life Expectancy Should Not Be Considered Separately as an Item of Damages.*

The Court of Appeals concluded that it was not feasible to consider shortening of life expectancy, *per se*, as a separate compensable element of damages because of the

"incalculable variables which may enter into an attempt to place a value on life; absent some workable criteria, a damage award would be base speculation." (3a, App. B, Pet.)

The years for which damages are claimed represent the terminal years of life which may not necessarily be happy or pleasurable. They may be fraught with extreme pain and suffering, insanity, natural deterioration by reason of age, and total inability to indulge in any physical activity. These conditions may be brought about by many intervening circumstances totally unconnected with the previous injury complained of, or, in fact, in the absence of any injury. Therefore, the plaintiff's death might occur much sooner than his estimated life expectancy, without the injury.

In this case the jury was properly charged and presumably awarded damages for diminution of earning power for such part of his reduced life expectancy of 12.6 years as he would have worked; damages for pain and suffering and mental anxiety in the future during that expectancy in life; and damages for that same expectancy for the loss of life's pleasures, which comprehend the normal activity and whatever enjoyment life might hold for him.

As pointed out by the Court of Appeals, these are the elements of damages normally involved in tort actions.

To award a separate sum on the theory that he would not live but 4 of the 12.6 years' expectancy would clearly be duplicating damages.

The facts in this case demonstrate the inability to determine with any degree of accuracy the span of life, as the plaintiff has now lived nearly 4 years beyond the time when his physician testified he would live. In this view, if the jury's award of $25,000 were sustained, the plaintiff would be recompensed for damages which he has not, in fact, suffered.

The Court of Appeals was correct in holding that the prospective shortening of life is but another element of damages to be considered in connection with economic losses,

pain and suffering, and loss of life's pleasures, under proper instructions.

III. Conclusion.

For the foregoing reason the Petition for Writ of Certiorari should be denied.

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